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No. 08-453

IN THE

Supreme Court of the United States

ANDREW W. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL FAIR HOUSING ALLIANCE, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are civil rights groups committed to the effective enforcement of antidiscrimination and consumer protection laws. More details about the individual *amici* are included in the Appendix.

SUMMARY OF ARGUMENT

This case demonstrates perfectly why it is inconceivable to think that Congress intended for any federal agency – much less the Office of the Comptroller of the Currency ("OCC"), with its extremely limited resources and oversight capacity – to preclude states from vigorously enforcing their own fair lending and antidiscrimination laws. In 2005, the New York Attorney General learned, based on data publicly available pursuant to the federal Home Mortgage Disclosure Act (HMDA), that several national banks had issued a disproportionate number of high-interest home mortgage loans to minority borrowers. Pet. 10; Pet. App. 68a (citing, *e.g.*, N.Y. EXEC. LAW § 296-a). Concluding that the data established a *prima facie* case of race discrimination, the Attorney General sent letters to several banks requesting additional information. Pet. App. 68a.

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent The Clearing House Association, L.L.C. have filed global consent letters with the Clerk of the Court; a letter of consent from respondent Office of the Comptroller of the Currency has been lodged with the Clerk of the Court pursuant to Rule 37.3.

Although it had access to the same HMDA data on which the New York Attorney General relied, OCC was not actively investigating the banks in question. Nor did it commence a complementary investigation of its own upon learning of the Attorney General's letters. Instead, OCC sued to enjoin New York's investigative and enforcement efforts, even before the national banks could do so.

OCC's action cuts at the heart of the overlapping regulatory scheme envisioned by Congress. That scheme allows states to serve as enforcers of fair lending laws alongside the federal government and provide a concerted two-part force to address the lending discrimination, disinvestment, and decay that have long impacted minority communities. By asserting exclusive authority to enforce state fair lending laws, OCC has improperly assumed exclusive power for itself in a vital realm of civil rights enforcement, where it is simply inconceivable that Congress intended federal agencies to displace states from taking robust action to ensure compliance with their own laws. Indeed, one recent addition to that scheme – the Riegle-Neal Interstate Banking and Efficiency Act – expressly preserves an important role for the states in enforcing fair lending laws.

The federal fair housing statutory scheme enacted by Congress thus recognizes that vigorous state enforcement can and should play an important role to address the nation's history of lending discrimination, which persists into the present and has contributed significantly to the current foreclosure crisis. Although the private sector maintained discriminatory lending policies long before the federal government became involved in the

lending industry, the government nonetheless bears substantial responsibility for this pattern. Beginning with the Great Depression, the government implemented the same kinds of overt discriminatory practices already in use in the private sector, but on an unprecedented scale. Although Congress eventually enacted legislation intended to eliminate lending discrimination, enforcement of those laws has been, at best, inconsistent.

More recent discriminatory practices have taken new forms. While minorities have historically been denied access to credit, national banks and other lenders have recently targeted minority borrowers for high-cost, predatory subprime loans that commonly are provided in discriminatory ways. The result is a system that disproportionately relegates minorities and minority neighborhoods to high-risk loans while offering similarly situated white borrowers prime interest rates and more favorable terms. This two-tiered system has substantially disadvantaged minority communities, where borrowers pay millions of dollars each year in interest and fees to high-cost lenders and often cannot afford the exorbitant rates that kick in after lower introductory "teaser" rates expire. Awash in such subprime mortgage loans, it is not surprising that these neighborhoods have been hit hardest by the current foreclosure crisis. As foreclosures erode property values and discourage investment, the net effect has been a grievous loss of wealth in minority communities.

The entrenched nature of discrimination in access to credit, with its pernicious intergenerational wealth effects, and the history of inconsistent federal enforcement of fair lending laws thus reinforce the

need for a dual enforcement scheme that operates as Congress intended, by allowing states to serve alongside the federal government in enforcing fair lending laws. OCC simply is not equipped to supplant the states' enforcement of their fair lending laws. Conversely, states better understand their own laws and have far greater resources to address the problem.

ARGUMENT

I. Congress Intended To Preserve An Important Role For The States In Fair Lending Enforcement.

A. The Federal Fair Lending Statutory Scheme Envisions Dual Enforcement of Fair Lending Laws.

Provisions in the federal laws prohibiting discrimination in mortgage lending demonstrate that Congress intended to preserve an important role for the states in fair lending enforcement. When Congress passed Title VIII of the 1968 Civil Rights Act, known as the 1968 Fair Housing Act ("Title VIII") – the first ever federal housing antidiscrimination law[2] – many states and localities already had some form of fair housing law. *See* William J. Collins, *The Political Economy of State Fair Housing Laws Before 1968*, 30 SOC. SCI. HIST. 15 (2006). Recognizing this, Title VIII established state and local agencies as the first line of defense against

[2] Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631).

discriminatory housing and lending practices by directing the Secretary of Housing and Urban Development ("HUD") to refer any complaint of a "discriminatory housing practice" to a state or local agency whose law was certified by HUD as substantially equivalent to Title VIII. 42 U.S.C. § 3610(a)-(c) (1982 & Supp. 1987).[3] The 1988 amendments to Title VIII[4] continued and strengthened this enforcement structure. *See* 42 U.S.C. § 3610(f)(1). By then, thirty-six states and seventy-nine localities had laws that HUD recognized as "substantially equivalent." ROBERT G. SCHWEMM, HOUSING DISCRIMINATION § 24.5(3) (1st. ed. 1990). Congress took note, specifically "recogniz[ing] the valuable role state and local agencies play in the [Title VIII] enforcement process." H.R. REP. NO. 100-711, at 35 (1988).

Today, thirty-eight states and sixty-nine local governments have laws that HUD has recognized as "substantially equivalent" to Title VIII, as amended. HUD, Fair Housing Assistance Program Agencies, http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Mar. 3, 2009). As the district court recognized, the Fair Housing Act authorizes enforcement of these "substantially equivalent" laws by HUD-certified state and local agencies. *See* Pet.

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[3] The certification process is described at 42 U.S.C. § 3610(f)(3)-(5); *see also* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION § 24.5(2) (1st ed. 1990).

[4] Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619.

App. 138a; *see also* 42 U.S.C. § 3610(f).[5] HUD subsequently confirmed that the district court opinions in this case do not "in any way affect[] the authority of state and local agencies to enforce their own fair housing laws that HUD has certified as substantially equivalent to" Title VIII. Authority of Agencies in the Fair Housing Assistance Program to Investigate Allegations of Discrimination in Lending Complaints, 71 Fed. Reg. 33,138 (June 7, 2006) (to be codified at 24 C.F.R. pt. 115). The Second Circuit's decision in no way undermined this interpretation.[6]

Here, New York did not pursue its fair lending investigation pursuant to a "substantially equivalent" law. This fact, however, does not alter the result of the statutory analysis. Other parts of Title VIII (and the FHAA) demonstrate the importance that Congress attributed to broader state enforcement of their fair housing laws – regardless whether those laws have been certified by HUD as "substantially equivalent" to Title VIII. For example, Title VIII and the FHAA direct HUD to cooperate with state agencies that are "formulating or carrying on programs to prevent or eliminate discriminatory housing practices," 42 U.S.C. § 3608(e)(3). Another provision – distinct from the "substantially

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[5] To be certified as substantially equivalent, state fair housing laws must include not only administrative enforcement, but also judicial review and a judicial enforcement alternative similar to the one provided by the FHAA. 42 U.S.C. § 3610(f)(3)(A)(iii)-(iv).

[6] Indeed, OCC recognized this authority in its brief in the Second Circuit. *See* OCC C.A. Br. 56.

equivalent" certification process – explicitly preserves "any law of a State or political subdivision of a State . . . that grants, guarantees, or protects the same rights that are granted by [the Act]." 42 U.S.C. § 3615. Title VIII even provides financial assistance to state and local enforcers. Under 42 U.S.C. § 3616, HUD may "reimburse such agencies and their employees" for their enforcement efforts. Pursuant to that section, HUD developed the Fair Housing Assistance Program, which promotes greater enforcement of fair housing laws by providing financial assistance to state and local agencies. *See* 24 C.F.R. § 115.300.

The second prong of the federal fair lending statutory scheme – the Equal Credit Opportunity Act ("ECOA")[7] – also reflects Congress's intent to preserve a role for the states in fair lending enforcement. In that Act, Congress explicitly refused to "annul, alter, or affect, or exempt any [creditor] from complying with, the laws of any State with respect to credit discrimination," except to the extent that the Act affirmatively preempted those laws. 15 U.S.C. § 1691d(f). Further, although the Board of Governors of the Federal Reserve System is authorized to annul state laws "inconsistent with" ECOA, it may not do so if those laws "give[] greater protection to the applicant." *Id.* And although Congress indicated that the ECOA's provisions "shall be enforced" against national banks by OCC, 15 U.S.C. § 1691c(a)(1)(A), the Senate Report that

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[7] Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691).

accompanied the bill explained both that "federally chartered financial institutions should be subject to State consumer protection laws" and that the federal government should "not interfere with the efforts of a State to protect consumers" absent "overriding interests to the contrary," S. REP. NO. 93-902, at 12-13 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6119, 6130-31.

Similarly, other federal housing laws echo the important role of states in fair housing and fair lending enforcement. The 1974 Housing and Community Development Act[8] requires states receiving federal community development grants to "affirmatively further fair housing" and ensure that the grants will be administered in conformity with the Civil Rights Act of 1964 and Title VIII. 42 U.S.C. § 5304(b)(2). This affirmative requirement would be rendered virtually meaningless if states were precluded from investigating violations of their own state fair housing laws against national banks.

In light of this statutory scheme, OCC does not argue that the National Bank Act pre-empts state fair lending laws themselves. Instead, it argues only that the Act precludes states from enforcing their fair lending laws outside the enforcement mechanism of a "substantially equivalent" law. But that position is untenable. OCC has provided no reason to think that Congress intended to pre-empt only state enforcement of state fair lending laws that have not

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[8] Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 15 U.S.C. § 5301).

been deemed "substantially equivalent," much less that Congress intended to do so without saying explicitly.

In any event, the regulatory scheme envisioned by OCC and the Second Circuit would be particularly odd in light of the Second Circuit's having vacated the portion of the district court injunction prohibiting the New York Attorney General from directly enforcing Title VIII pursuant to *parens patriae* standing. *See* Pet. App. 39a. The Second Circuit thus left open the anomalous possibility that a state such as New York would be unable to enforce its own fair lending and antidiscrimination laws against national banks, but could nonetheless enforce federal fair housing laws against the same entities. Moreover, given the federal statutory scheme's solicitude for state fair lending enforcement, it would be equally odd to read Title VIII's authorization of state enforcement of "substantially equivalent" state fair lending laws as a ceiling that permits states to enforce only state laws similar to Title VIII as amended by the FHAA, rather than as a floor designed to encourage state enforcement of fair lending laws beyond what federal law requires.

B. In Riegle-Neal, Congress Intended For OCC To Complement, Not Preclude, State Fair Lending Enforcement Efforts.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal")[9]

[9] Pub L. No. 103-328, 108 Stat. 2338.

reinforces the conclusion that states continue to have power to enforce their fair lending laws against national banks. The Act makes clear that state fair lending laws – which, of course, have traditionally been enforced by the states – "*shall* apply" to state branches of national banks "to the same extent as such State laws apply to a branch of a bank chartered by that State." 12 U.S.C. § 36(f)(1)(A) (emphasis added). Although Congress granted OCC concurrent enforcement authority, *see id.* § 36(f)(1)(B), it did not give OCC *exclusive* enforcement authority. Particularly in light of this Court's directive that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States," *see Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), OCC has provided no basis for concluding that Congress, *sub silentio*, displaced the states' historic enforcement powers. *See Wyeth v. Levine*, slip op. 18 (Mar. 9, 2009) (plurality) ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point" but failed to do so).

Respondents' argument that Congress intended OCC to be the exclusive enforcer of state law rests on a strained reading of 12 U.S.C. § 36(f)(1)(B), which provides that OCC "shall" enforce such laws. *See, e.g.*, BIO 31. This argument is contrary to both the text of the statute and basic principles of statutory interpretation. With regard to the text, "shall" means only that one "has a duty to" or "is required to" carry out certain actions – not that one has the *exclusive* duty or requirement to carry out such actions. *See*

BLACK'S LAW DICTIONARY 1407 (8th ed. 2004); *see also* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1207 (2000) (defining "shall" as "will have to" or "is . . . obliged to").

OCC's construction of the word "shall" also compels an absurd result, because words appearing in multiple locations in a statute should be similarly construed. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46-5, at 189-90 (7th ed. 2007). If "shall" connotes exclusivity in § 36(f)(1)(B), then it must do the same in § 36(f)(1)(A), in which Congress provided that state community reinvestment, consumer protection, fair lending, and bank branching laws "shall apply" to national bank branches. Because Congress obviously did not intend to subject state branches of national banks only to these enumerated state laws and immunize them from federal banking laws, the more natural reading of the "shall enforce" clause is the reading supported by the dictionary definition of "shall" – *i.e.*, as establishing concurrent, rather than exclusive, federal enforcement authority.

This construction also finds support in the legislative history of Riegle-Neal. Recognizing states' "legitimate interest in protecting the rights of their consumers, businesses, and communities," Congress made clear that it did not intend Riegle-Neal to "weaken States' *authority to protect* the interest of their consumers, businesses, or communities." H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (emphasis added). Instead, Congress intended to "preserve[] the States['] *ability to apply* State laws regarding intrastate branching, fair lending and consumer

protection." 140 CONG. REC. H6777 (daily ed. Aug. 4, 1994) (remarks of Rep. Roukema) (emphasis added).

Accordingly, Congress clearly realized that states – through enforcement of their own fair lending laws – play a critical role in safeguarding against discrimination in lending, housing, and access to credit.

II. The Long History Of Racial Discrimination Demonstrates The Need For A Dual Federal And State Fair Lending Enforcement Structure.

The history of lending discrimination is long, well-documented, and – unfortunately – continues in both the private and public sectors. While federal antidiscrimination laws were passed to address this history, they only partially remedied such inequities. Their effects were curtailed by federal regulators' reluctance to enforce these laws against private banks. The legacy of this pervasive discrimination and reluctant, uneven remediation requires all resources – federal *and state* – that can be mustered to address it.

A. The Public And Private Sectors Each Mutually Reinforced The Other's Discriminatory Lending Practices In Ways That Have Had Intergenerational Effects.

During the early years of the twentieth century, private lenders and realtors actively discriminated against minorities to keep neighborhoods racially segregated. KENNETH T. JACKSON, CRABGRASS FRONTIER 198 (1985). Indeed, racial discrimination

was so widespread that a real-estate appraisal manual, regarded as the "bible of appraising," openly advised appraisers "to determine whether there were 'undesirable racial elements' in an area." Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. REV. 313, 323 (1979).[10]

The Great Depression created widespread demand for government action in the housing and lending sectors. JACKSON, *supra*, at 193. In response, Congress passed, among other acts, the Home Owners Loan Act of 1933,[11] which created the Home Owners Loan Corporation ("HOLC") to provide mortgage assistance.[12] The HOLC "institutionalized the practice of 'redlining,'" DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 51 (1993), a process by which lending institutions – either literally or figuratively – "block[ed] off certain areas

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[10] Such practices were part and parcel of widespread and overt discriminatory housing practices during the first decades of the twentieth century. These included local ordinances prohibiting African-Americans from living on blocks where the majority of houses were occupied by white persons, *see Buchanan v. Warley*, 245 U.S. 60 (1917); racially restrictive covenants that continued even after the Supreme Court held them unenforceable in *Shelley v. Kraemer*, 334 U.S. 1 (1948), *see* DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY 120-21 (1968); and the posting of signs by small towns warning African Americans to leave before sunset or not enter at all, *see* JAMES LOEWEN, SUNDOWN TOWNS 4-5 (2005).

[11] Pub. L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468).

[12] § 4, 48 Stat. at 129-32 (repealed by Act of June 30, 1953, ch. 170, § 21, 67 Stat. 126).

of cities within 'red lines,'" refusing "to loan . . . within them," NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, at 101 (1968). Although private lenders already used similar tactics, the HOLC implemented them on an "unprecedented scale," JACKSON, *supra*, at 199, thereby "len[ding] the power, prestige, and support of the federal government to the systematic practice of racial discrimination in housing," MASSEY & DENTON, *supra*, at 52.

HOLC's redlining practices were expanded by the Federal Housing Administration ("FHA"),[13] another New Deal institution created to stimulate the housing market, JACKSON, *supra*, at 203-04. The significance of the FHA's role in redlining during the mid-twentieth century cannot be overemphasized: "No agency of the United States government has had a more pervasive and powerful impact on the American people . . . than the [FHA]." *Id.* at 203.

The FHA played two important roles. First, unlike the HOLC, which directly issued loans and refinanced mortgages, the FHA induced private lenders to issue mortgages by providing an essential ingredient: mortgage insurance. JACKSON, *supra*, at 196, 204. The FHA "engaged in 'both official and informal [f]ederal encouragement of racial segregation' by . . . refusing to provide insurance in integrated neighborhoods, promoting the use of racially restrictive covenants, and red[]lining

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[13] *See* National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750).

practices." *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 466 (D. Md. 2005) (quoting *Equal Educational Opportunity, Part 5 — De Facto Segregation and Housing Discrimination: Hearings Before the S. Select Comm. on Equal Educational Opportunity*, 91st Cong. 2755 (1970) (statement of George Romney, Secretary, HUD)); *see also* DAN IMMERGLUCK, CREDIT TO THE COMMUNITY 94 (2004). In some cases, the presence of even a single non-white family was enough for the FHA to refuse to insure any loans to an entire block. JACKSON, *supra*, at 208-09.

Just as importantly, the FHA acted "as a standard setting agency," establishing and disseminating appraisal, insurance, and loan practices for use by the private sector. IMMERGLUCK, *supra*, at 94. The FHA's embrace of redlining became the standard for private loans: where the FHA refused to insure, private banks refused to lend. Thus, by the 1960s, one-half of Detroit and one-third of Chicago were simply redlined out of eligibility for FHA mortgage insurance. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1311 (1995).[14]

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[14] Other cities faced similar discrimination and segregation problems, leading one court to find that "racial segregation and racial discrimination in public and private housing" created "a housing emergency in Boston." *NAACP v. Harris*, 567 F. Supp. 637, 640-41 (D. Mass. 1983); *see also NAACP v. Sec'y of HUD*, 817 F.2d 149 (1st Cir. 1987) (Breyer, then-Judge) (affirming findings of fact in *Harris*).

This blatant lending discrimination had significant effects on minority borrowers, in the housing sector and beyond. Redlining created a two-tiered lending system that would set the stage for today's subprime crisis: although white borrowers could obtain traditional loans, minority borrowers were forced to resort to less attractive credit instruments, often referred to as the "underworld" of finance. Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 801 & n.69 (1995).

This two-tiered system was also reflected in the small business loan industry, where minorities experienced significant difficulty in obtaining both public and private loans: in the 1940s, only 3.3% of African-American-owned businesses could secure any credit from banks. IMMERGLUCK, *supra*, at 60. In response, minorities set up their own banks. *Id.* at 59. However, racial discrimination limited the banks' ability to obtain and loan capital, thereby "stunt[ing] their ability to serve larger, creditworthy firms" and reducing the ability of minority-owned businesses to expand. *Id.* This pattern of racial discrimination in small business loans continued through the next half-century. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169-70 (10th Cir. 2000) (describing the "striking" evidence of "race-based denial of access to capital" to minority enterprises over time, based on numerous Congressional hearings and reports), *cert. dismissed sub nom. Adarand Constructors v. Mineta*, 534 U.S. 103 (2001) (per curiam).

B. Federal Remedial Legislation Has Failed To Solve Racial Lending Disparities.

Decades of racial discrimination created a "spiral of decline" in inner cities, as a lack of capital depressed property values and drove off businesses. MASSEY & DENTON, *supra*, at 55. This spiral culminated in the race riots of the 1960s, with hundreds of lives lost and millions of dollars in property damage sustained. *Id.* at 58-59. The commission convened to investigate the cause of the riots concluded that redlining was one of the causes of the racial tension and recommended that Congress enact federal fair housing laws. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257-63 (1968) ("THE KERNER REPORT").

Adopting this recommendation, Congress enacted Title VIII, which – among other things – prohibits racial discrimination in the sale, purchase, brokerage, or appraisal of property. 42 U.S.C. §§ 3604, 3605. In the decade that followed, Congress passed a variety of fair lending laws to complement Title VIII, including the ECOA, the HMDA,[15] and the Community Reinvestment Act ("CRA").[16]

Despite Congress's good intentions, these fair housing and lending laws have failed to remedy the decades-old effects of lending discrimination, in no

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[15] Pub. L. No. 94-200, tit. III, 89 Stat. 1125 (1975) (codified as amended at 12 U.S.C. §§ 2801-2810).

[16] Pub. L. No. 95-128, tit. VIII, 91 Stat. 1111, 1147-48 (1977) (codified as amended at 12 U.S.C. §§ 2901-2905).

small part due to their inconsistent enforcement. *See* NAT'L COMM'N ON FAIR HOUSING AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 10, 13-19, 22-25 (2008) [hereinafter FAIR HOUSING].

First, although Title VIII authorizes individuals who believe that they have been victims of discrimination to file complaints, 42 U.S.C. § 3610(a)(1)(A)(i), limited access to information increases the obstacles to private enforcement in the lending sector. "Individual loan applicants typically are not sophisticated enough to realize when they have been prescreened illegally or denied a mortgage loan on a prohibited basis." Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REF. 527, 544 (1993) (footnote omitted). "The history of discrimination and redlining [that] has made many minorities 'accustomed' to rejection and less likely to question or contest it" has only exacerbated these information asymmetries. IMMERGLUCK, *supra*, at 136.[17]

As a result of the obstacles to individual suits, primary responsibility for enforcement of the federal

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[17] In one recent study, over 80% of those who believed they had experienced discrimination in the housing market did nothing about it. MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS 27 tbl. 12 (2002). Similar information asymmetries hamper individual enforcement of the rights protected by ECOA. *See* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 626-27 (2005).

fair lending and fair housing laws has fallen to HUD and the Department of Justice ("DOJ"), whose enforcement of Title VIII and the ECOA has been, at best, inconsistent. Under the original version of Title VIII, "HUD ha[d] no power of enforcement." *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 210 (1972). It was instead limited to "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 3610(a) (1982 & Supp. 1987).[18] Even after the 1988 FHAA created an enforcement mechanism for HUD, fair lending enforcement has been limited: HUD filed only 31 discrimination charges in 2007. FAIR HOUSING, *supra*, at 13-14.

A similar story can be told about the DOJ. Under the amended Title VIII and the ECOA, the DOJ's independent enforcement authority is limited primarily to instances of a "pattern or practice" of discrimination or discrimination of "general public importance." 42 U.S.C. § 3614. There was very little fair lending enforcement by the DOJ until 1992. While there was a spurt of fair lending enforcement until 2000, it subsequently dissipated.[19]

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[18] As described above, however, Title VIII – both as originally enacted and in its modern incarnation – carves out a significant role for the states. *See* 42 U.S.C. §§ 3610(f), 3615; Pub. L. No. 90-284, §§ 810(c)-(d), 82 Stat. 81, 86 (1968).

[19] According to the list of cases on the DOJ website, *see* U.S. Dep't of Justice, Fair Housing Cases, http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#l (last visited Mar. 4, 2009), fifteen fair lending cases challenging discrimination in real-estate-related lending were brought from 1992-2000, many of which challenged discriminatory predatory

OCC's fair lending enforcement record pursuant to the ECOA, 15 U.S.C. § 1691c(a)(1)(A), is even spottier. During the fifteen-year period from 1990 to 2004, OCC brought only four formal enforcement actions under the ECOA and/or its implementing regulation.[20] And although OCC is required by the ECOA to "refer . . . matter[s] to the Attorney General with a recommendation that an appropriate civil action be instituted" whenever it "has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of" the ECOA, 15 U.S.C. § 1691e(g), between 1999 and 2005 OCC made only six fair lending referrals to DOJ, only one of which involved discrimination on the basis of race or national origin.[21]

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activities. But since 2001, DOJ has brought only five fair lending cases dealing with residential lending. None has concerned predatory lending practices despite extensive research demonstrating the discriminatory patterns so prevalent in the subprime market. *See* FAIR HOUSING, *supra*, at 23.

[20] This information is contained in annual reports that the Federal Reserve Board ("FRB") and U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f; *see also* FRB, ANNUAL REPORT 2004, at 69-70. The relevant pages from the FRB Annual Reports by year are as follows: for 2003, 67-68; 2002, 75-76; 2001, 134-35; 2000, 105-06; 1999, 107-08; 1998, 221-22; 1997, 192-93; 1996, 200; 1995, 212; 1994, 224-25; 1993, 210-11; 1992, 196-97; 1991, 181-82; 1990, 168. *See* FRB, Reports to Congress, http://www.federalreserve.gov/boarddocs/rptcongress/ (last visited March 4, 2009).

[21] *See, e.g.*, THE ATTORNEY GENERAL'S 2005 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT

Furthermore, although Title VIII requires federal banking regulators, including OCC, to "administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes" of the Act, 42 U.S.C. § 3608(d), there too implementation and enforcement efforts have been inconsistent and sometimes reluctant. This reluctance dates back to the post-Depression era, when banking regulators adopted a policy of "benign neglect" towards discrimination by private lenders. Bradford, *supra*, at 324. Once Title VIII was enacted, federal bank regulators were slow to implement it: it was eight years before any regulator issued a final regulation under the Act, IMMERGLUCK, *supra*, at 137, and it took a lawsuit to force regulators – including OCC – to promulgate regulations to enforce and monitor compliance with federal anti-discrimination laws, including Title VIII. JOHN GOERING & RON WIENK, MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 402 (1996). Indeed, it was this lawsuit that prompted OCC to create its Consumer Affairs Division. *Id.*

Enforcement of the other federal fair lending laws has been similarly inconsistent. For example, the CRA requires federal banking regulators, including OCC, 12 U.S.C. § 2902(1)(A), to "assess a [regulated] institution's record of meeting the credit

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OPPORTUNITY ACT AMENDMENTS OF 1976, at 1-4. The remaining reports are at http://www.usdoj.gov/crt/housing/housing_special.php.

needs of its entire community, including low- and moderate-income neighborhoods," 12 U.S.C. § 2903(a)(1). However, these assessments of housing and small business loans have been conducted in such a manner that, "[t]hroughout the 1980s, [they] were almost impossible to fail": one study found that only 2.4% of 26,000 CRA examinations conducted between 1985 and 1988 resulted in a poor evaluation. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 243 n.33 (1996) (citation omitted). In 1997, OCC made the CRA assessments even less burdensome, counseling its bank examiners to look beyond the banks' self-evaluations of their lending patterns "only where questions are raised." OCC, COMMUNITY REINVESTMENT ACT EXAMINATION PROCEDURES 5 (1997).

III. Lending Discrimination Persists And Plays An Important Role In The Ongoing Foreclosure Crisis And The Elimination Of Wealth Accumulated By Minorities.

Although well-intentioned, federal remedial legislation has failed to eliminate racial discrimination in the credit market. Today, lenders continue to discriminate against minorities, denying them access to credit through redlining and other techniques. Exacerbating racial inequities, the more recent introduction of subprime lending has led to exploitation of the credit vacuum in the form of targeting minorities for high-cost loans that they cannot afford. *See* William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending* 1 (Joint Ctr.

for Hous. Studies, Harvard Univ., Working Paper No. W05-11, 2004). The infusion of risky credit in minority communities has recreated a two-tiered system: white borrowers have access to prime-rate loans from mainstream lenders, while minorities are relegated to the subprime market. *See id.* at 1, 10. And although targeted subprime lending is a distinct practice from redlining, its effects are much the same: it undermines minority communities, stripping borrowers of equity and siphoning capital out of neighborhoods struggling to build wealth. *See* GREGORY D. SQUIRES & CHARLES E. KUBRIN, PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY 56 (2006). In the home lending industry, borrowers unable to repay costly mortgages lose their homes, leaving minority communities to again suffer the consequences of rapid disinvestment.

A. Lenders Continue To Deny Minorities Access To Credit Through Redlining And Disparate Treatment Of Minority Applicants.

Notwithstanding remedial legislation, redlining remains a persistent problem today. The handful of cases brought by the DOJ in recent years demonstrates the extent to which the practice continues. For example, as recently as 2006, the DOJ filed a complaint alleging that Centier Bank refused to lend to would-be borrowers in minority neighborhoods. Compl. ¶ 10, *United States v. Centier Bank*, No. 2:06-CV-344 (N.D. Ind. Oct. 13, 2006) (settled by consent order). Two years earlier, the DOJ filed a similar suit against First American Bank, which had "acted to meet the residential, consumer

and business credit needs of predominantly white [areas but] avoided serving the lending and credit needs of minority [areas]." *See* Compl. ¶ 12, *United States v. First Am. Bank*, No. l:04-CV-4585 (N.D. Ill. July 13, 2004) (settled by consent order). That same year, DOJ settled a case against Old Kent Bank, which allegedly issued only 2.2% of all its loans in the Detroit metropolitan area to applicants in Detroit's inner city. *See United States v. Old Kent Fin. Corp.*, No. 04-71879, 2004 WL 1157779, at *3 (E.D. Mich. May 19, 2004) (entering settlement agreement). Borrowers have filed similar suits, including one accusing Bank of America of "schem[ing] to direct its . . . mortgage transactions . . . in neighborhoods primarily comprised of Caucasians," *Johnson v. Equicredit Corp.*, No. 1C5197, 2002 WL 448991, at *4 (N.D. Ill. Mar. 22, 2002) (settled out of court).

A key component of redlining is the banks' refusal to establish branches in minority neighborhoods. *See* David N. Figlio, *Bank Consolidations and Minority Neighborhoods*, 45 J. URB. ECON. 474 (1999). In a particularly striking example, as of 2000, one lender had established fifty-three branches in the greater Detroit area without locating a single one in the largely African-American inner city. *Old Kent Fin. Corp*., 2004 WL 1157779, at *2. Similarly, of Centier Bank's twenty-seven branches around Gary, Indiana, none were located in minority neighborhoods as of 2001. *See* Compl. ¶ 13, *Centier Bank*, No. 2:06-CV-344. The dearth of bank branches in minority communities significantly undercuts access to credit, because individuals in those communities are denied services like credit counseling and bank-funded credit lines. Gregory D. Squires, *The New Redlining*, *in* WHY THE POOR PAY

MORE 1, 8 (Gregory D. Squires ed. 2004). The problem is particularly acute for small businesses, which require in-person visits from loan officers to secure credit. *See* IMMERGLUCK, *supra*, at 76. Because loan officers often make loans only within a small radius of their branch and may also be reluctant to enter minority neighborhoods, minority-owned firms lack opportunities available to businesses in white areas rich in banking services. *Id.* at 67, 76.

When minority borrowers do seek loans from mainstream lenders, the lenders frequently subject them to discriminatory treatment. One government study that compared 250 test pairs, each including one white and one African-American or Latino borrower, concluded that despite having equal or better qualifications, minorities were repeatedly offered lower loan amounts, fewer loan products, and less credit counseling than white borrowers. HUD, ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS 39 (2002). Similar studies revealed that lenders treated minorities unequally in nearly half of their interactions. *See Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the H. Financial Serv. Comm.*, 110th Cong. 268 (2007) (statement of John Taylor, President and CEO, National Community Reinvestment Coalition). Given these patterns, it is not surprising that lenders deny minorities loans at significantly higher rates than white applicants. CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, ACCESS DENIED: LOW INCOME AND MINORITY FAMILIES FACE MORE CREDIT CONSTRAINTS AND HIGHER BORROWING COSTS 2 (2007).

B. The Present Credit Crisis Reflects A New Discriminatory Pattern Of Targeting Minorities For High-Cost, Subprime Loans.

Decades of discrimination have left many minorities without adequate credit and unfamiliar with the lending process. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 637 (2008). Taking advantage of these conditions, unscrupulous lenders peddling high-cost loans have increasingly focused on minority communities. *See* SQUIRES & KUBRIN, *supra*, at 56. This practice has been dubbed "reverse redlining" for both the deliberateness with which minorities are targeted and lenders' efforts to take advantage of inexperienced borrowers by flooding them with costly loans rather than denying them credit. *See id.*; Compl. 20, *Mayor of Baltimore v. Wells Fargo Bank*, No. 1:08-CV-00062 (D. Md. Jan. 8, 2008) (alleging that the bank "[t]arget[ed] Baltimore's African American [n]eighborhoods for [i]mproper and [i]rresponsible [l]ending [p]ractices").

The explosion of "fringe" lenders in minority neighborhoods is a prime example of reverse redlining. Check cashers, payday lenders, and tax refund advance services flourish in communities where banks refuse to lend. *See* Squires, *supra*, at 7; NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT, RAPID RIP-OFFS: TAX REFUND ANTICIPATION LENDING IN NEW YORK CITY 2 (2006) [hereinafter RAPID RIP-OFFS]. Recent studies found that African-American neighborhoods have an average of three times more payday lenders than white neighborhoods, CTR. FOR

RESPONSIBLE LENDING, RACE MATTERS: THE CONCENTRATION OF PAYDAY LENDERS IN AFRICAN AMERICAN NEIGHBORHOODS IN NORTH CAROLINA 2 (2005) [hereinafter PAYDAY LENDERS], and refund advance services cluster in areas where minorities comprise over ninety-five percent of the population, RAPID RIP-OFFS, *supra*, at 4. Although these lenders purport to relieve financial woes by providing access to quick cash, they in fact trap borrowers in debt, as few can repay loans and cover the exorbitant fees in the short time allotted. PAYDAY LENDERS, *supra*, at 3-4. Use of fringe lending services can be extremely costly: borrowers pay, on average, $1000 more annually in fees to check cashers and payday lenders than they would to banks. SQUIRES & KUBRIN, *supra*, at 15.

Lenders also target minorities for subprime credit cards. *See e.g.*, Compl. ¶ 11, *United States v. Fid. Fed. Bank*, No. 1:02-cv-03906-NG-MDG (E.D.N.Y. July 8, 2002) (alleging that the lender marketed high-interest credit cards to African Americans and Latinos through church groups and in-home sales) (settled out of court). Aggressive marketing strategies and abusive terms have led to rising debts among minorities. JAVIER SILVA & REBECCA EPSTEIN, COSTLY CREDIT: AFRICAN AMERICANS AND LATINOS IN DEBT 6-7 (2005).

C. As A Result Of Reverse Redlining In The Home Lending Industry, Minorities Account For A Disproportionate Share Of Subprime Mortgages.

Particularly pervasive in the home mortgage industry is reverse redlining, which targets minority

borrowers for high-cost, subprime loans. In perhaps the most pernicious practice, profit-seeking mortgage lenders often attempt to steer minority borrowers towards risky subprime loans even when they would qualify for prime loans. FAIR HOUSING, *supra*, at 33. Indeed, one study of subprime loans made between 2000 and 2006 calculated that over half of subprime borrowers – among whom minorities are over-represented relative to their share of the population – could have qualified for prime-rate mortgages. *Id.* The differences in the overall costs to the borrower can be substantial. On average, a subprime loan can cost the borrower nearly $300 more per month, and as much as $100,000 over the life of the loan, *see* NAT'L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II, at 8 (2008) – money that could otherwise be used elsewhere, including for education or reinvestment in the community.

Reverse redlining has had predictable effects: although the majority of subprime loans go to non-Latino white borrowers, approximately half of all mortgage loans made to African Americans and Latinos are subprime, compared with less than twenty percent of loans made to white borrowers. FAIR HOUSING, *supra*, at 33 (analyzing 2006 HMDA data). In New York, where the Attorney General's investigation into discriminatory lending sparked this lawsuit, the ten neighborhoods with the highest levels of subprime lending are predominantly African American or Latino, while the ten neighborhoods with the lowest levels are predominantly white. Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007, at A20.

Racial disparities persist even when income and credit history are taken into account. IMMERGLUCK, *supra*, at 118. Indeed, the disparities increase as salaries rise, with upper-income minorities receiving twice as many high-cost mortgage loans as upper-income whites. *See* Vikas Bajaj & Ron Nixon, *For Minorities, Signs of Trouble in Foreclosures*, N.Y. TIMES, Feb. 22, 2006, at A1.

National banks bear a significant share of the responsibility for the disproportionate number of subprime loans made to minorities. *See* CAL. REINVESTMENT COAL., WHO REALLY GETS HIGHER-COST HOME LOANS? 18 (2005). One study analyzing California's home loan market found that African Americans bore the heaviest burden: all told, they were over four times more likely than whites to receive high-cost home-refinance loans from national banks. *Id.*

D. Discriminatory Lending In The Mortgage Industry Frustrates Upward Mobility And Eliminates Wealth Accumulated By Minorities.

The effects of reverse redlining in the mortgage industry are both significant and wide-ranging. One unfortunate by-product of targeting minorities for high-cost home loans is that minorities are often unable to move into neighborhoods where they would enjoy better schools and more plentiful employment opportunities. *See* SQUIRES & KUBRIN, *supra*, at 23, 29. The inability to access such areas, which have often been historically white, thwarts minorities' advancement and perpetuates long-standing wealth disparities. *See id.* at 23.

The concentration of subprime mortgages among minorities also strips existing wealth. Because of exorbitant fees, initial higher interest rates, and resets that increase these rates, subprime loans are ten to twenty times more likely to end up in foreclosure than prime loans. *See* Dan Immergluck, *From the Subprime to the Exotic: Excessive Mortgage Market Risk and Foreclosures*, 74 J. AM. PLAN. ASS'N 59, 59-60, 66 (2008). Not surprisingly, minority neighborhoods have already been hardest hit by the foreclosure crisis, which is likely to worsen before it improves, *see* CTR. FOR RESPONSIBLE LENDING, UPDATED PROJECTIONS OF SUBPRIME FORECLOSURES IN THE UNITED STATES AND THEIR IMPACT ON HOME VALUES AND COMMUNITIES 1 (2008) (predicting that 2.2 million subprime mortgages will enter foreclosure by the end of 2009). In Chicago, where foreclosures tripled between 1993 and 2005, minority neighborhoods account for sixty-five percent of foreclosure filings. Bajaj & Nixon, *supra* (noting similar trends in Atlanta and Philadelphia). These areas averaged 41.6 foreclosures per 1000 mortgageable properties in 2007, over double the regional average. WOODSTOCK INST., FORECLOSURES IN THE CHICAGO REGION CONTINUE TO GROW AT AN ALARMING RATE 4 (2008).

The disproportionate impact of the foreclosure crisis has stripped minority communities of the hard-won gains in wealth that resulted from recent increases in legal, educational, and employment opportunities. *See* Melvin Oliver, Univ. of Cal. – Santa Barbara, Testimony at the National Commission on Fair Housing and Equal Opportunity 1 (Sept. 9, 2008). Historically, it is one of the greatest

losses of wealth in minority communities in generations. *Id.* at 5.

Although massive in scale, this pattern of losses is not unfamiliar, but is instead reminiscent of the "spiral of decline" sparked by redlining in the 1960s. When foreclosure rates are high, home values plummet, both because foreclosed homes sell at below-market prices and because the supply of available homes outpaces demand. KAI-YAN LEE, FED. RESERVE BANK OF BOSTON, FORECLOSURE'S PRICE-DEPRESSING SPILLOVER EFFECTS ON LOCAL PROPERTIES 1 (2008). The rising crime rates that accompany foreclosures then exacerbate the decline in home values. *See* Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUS. STUD. 851 (2006). The downward spiral continues as the neighborhood's remaining distressed borrowers lack the equity to refinance their own subprime loans because of the drop in home values, driving them into foreclosure. ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 3-4 (2006).

The effects of the foreclosure crisis extend beyond the individual to municipalities and residents in the broader community. Each foreclosure increases the burden on local public agencies, requiring them to spend more money on police patrols, building inspections, demolition contracts, and legal and administrative procedures. WILLIAM C. APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 4, 6 (2005). Distressed borrowers are also often unable to pay

property taxes, reducing the revenue flowing to local governments, *id.* at 7, and leading to tax increases and cuts in social services.

IV. In Light Of OCC's Limited Enforcement Capacity, The States Are Especially Well-Suited To Serve As Dual Enforcers Of Their Own Fair Lending Laws.

Congress's desire to preserve an important role for the states in the enforcement of fair lending laws reflects a common-sense approach to a severe and widespread problem. The overlapping state and federal regulatory schemes that Congress envisioned take account of OCC's limited capacity to enforce state fair lending laws as well as the suitability of, and incentives for, state enforcement. Such a dual enforcement regime will likely result in increased enforcement of fair lending laws and thereby better protect minority communities.

A. OCC Is Not Equipped To Act As The Exclusive Enforcer Of State Fair Lending Laws

Not only is OCC's actual record of federal fair lending enforcement spotty, as explained *supra* at 20-22, but OCC's capacity to serve as the exclusive enforcer of state fair lending laws, in addition to federal laws, is quite limited. To successfully police the lending practices of national banks' state branches, OCC would have to respond to complaints from, and conduct independent investigations in, all fifty states. But it lacks the resources, time, and manpower to do so. In 2005, for example, only one percent of OCC's budget went to its Consumer

Assistance Group, the fifty-person division charged with handling *all* consumer complaints. *See Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 80 (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School). Put another way, if OCC were indeed the exclusive enforcer of state fair lending laws, it alone would be responsible for "investigat[ing] all such complaints for 2150 national banks in the 50 States from a single customer assistance center which only takes calls from 9 am to 4 pm, on four days each week, excluding Federal holidays." H. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 16 [hereinafter HOUSE VIEWS AND ESTIMATES].

The problems created by OCC's limited enforcement capacity are compounded by the agency's financial incentives to refrain from investigating claims of lending discrimination. OCC's budget depends on assessments against nationally chartered banks, OCC, ANNUAL REPORT, FISCAL YEAR 2005, at 7 (2005), which can abandon their national charters at any time. OCC thus has a vested interest in reducing the regulatory burden on national banks to make the national charter as attractive as possible and thereby preserve its own budget. Indeed, when asked about OCC's power to preclude enforcement of state fair lending laws, former Comptroller John Dugan responded that "[preclusion] is one of the

advantages of a national charter, and I'm not the least bit ashamed to promote it." Paul Beckett & Jess Bravin, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers—Dependent on Lenders' Fees, OCC Takes Their Side Against Local, State Laws—Defending Uniform Rules*, WALL ST. J., Jan. 28, 2002, at A1.

In the five years since OCC appointed itself the exclusive enforcer of state fair lending laws, its limited enforcement capacity and its incentives to refrain from regulating have predictably prevented it from adequately policing the lending practices of national banks. For example, as discussed above, *see supra* at 20, OCC has an extremely poor track record in referring matters to DOJ pursuant to 15 U.S.C. § 1691e(g). OCC's last reported OCC referral based on race discrimination was in 1999, *see* Compl. ¶ 1, *United States v. Deposit Guar. Nat'l Bank*, No. 3:99-CV-00670-STL (S.D. Miss. Sept. 29, 1999).

OCC's failure to make referrals and enforce state laws cannot be attributed to a lack of discriminatory lending practices by national banks. Indeed, studies have confirmed that national banks frequently offer loans to minorities on terms that are less favorable than those offered to white borrowers. *See* CAL. REINVESTMENT COAL., *supra*, at 3, 18. But even if national banks were not already engaging in discriminatory lending, OCC's failure to investigate their lending practices would give them a blank check for future discrimination.

B. States Are Well Suited To Enforce State Fair Lending Laws.

Because states have the necessary resources to investigate and prosecute discriminatory lenders, they are ideally positioned to serve alongside the federal government as co-enforcers of fair lending laws. First, state enforcement agencies are by their nature better equipped to understand and apply their state's own fair lending laws.[22] Second, because they are responsible for a smaller geographic area, state enforcement agencies can conduct more comprehensive investigations. Third, and perhaps most importantly, states have substantial manpower to devote to scrutinizing the lending practices of national banks: collectively, state banking agencies and state attorneys general employ roughly seven hundred full-time examiners and attorneys to monitor

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[22] Indeed, states have enacted a variety of antidiscrimination laws designed in part to prevent discriminatory housing practices – all of which OCC claims the exclusive authority to enforce. *See, e.g.*, ALA. CODE §§ 24-8-1 to -15 (West 2008); CAL. GOV'T CODE §§ 12955-12956.2 (2008); DEL. CODE ANN. tit. 6, §§ 4600-4619 (West 2009); GA. CODE ANN. §§ 8-3-200 to -223; (West 2008); HAW. REV. STAT. §§ 515-1 to -20 (2008); KAN. STAT. ANN. §§ 44-1015 to -1044 (West 2008); LA. REV. STAT. ANN. §§ 50:2601-:2614 (West 2008); N.Y. EXEC. LAW §§ 290-301 (McKinney 2009); N.C. GEN. STAT. ANN. §§ 41A-1 to -10 (West 2008); R.I. GEN. LAWS §§ 34-37-1 to -11 (West 2008); S.C. CODE ANN. §§ 31-21-10 to -150 (West 2008); TEX. PROP. CODE ANN. §§ 301.001-.171 (Vernon 2007); UTAH CODE ANN. §§ 57-21-1 to -14 (West 2008); VA. CODE ANN. §§ 36-96.1 to .23 (West 2008); WIS. STAT. § 106.50 (West 2007).

compliance with consumer protection and fair lending laws. HOUSE VIEWS AND ESTIMATES, *supra*, at 16.

State enforcers have put these resources to good use. In 2001, for example, the North Carolina Attorney General's office obtained a twenty-million-dollar settlement in a predatory lending case against Citigroup. *See* Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 522 (2007). In 2003, the state agencies responsible for supervising banks initiated over twenty thousand investigations in response to consumer complaints, leading to over four thousand enforcement actions against abusive mortgage lenders. HOUSE VIEWS AND ESTIMATES, *supra*, at 16. And although OCC thwarted the investigation of national banks at issue in this case, the New York Attorney General has continued to enforce its fair lending laws against other entities. In January 2009, for example, it reached a settlement with two mortgage brokers, who agreed to pay $665,000 in restitution to 455 African-American and Latino customers charged substantially higher fees than similarly qualified white borrowers. *See* Bob Tedeschi, *Safeguarding Against Loan Discrimination*, N.Y. TIMES, Jan. 23, 2009, at RE6.

Nor is there any reason to believe that allowing states to enforce their own fair lending laws would subject national banks to multiple, possibly conflicting, regulatory schemes. First, the decision to retain these schemes has already been made by Congress, *see supra* Part I(B). But in any event, state attorneys general can and frequently do coordinate their efforts. For example, in 2002, a joint

investigation initiated by the attorneys general and financial regulatory agencies of nineteen states and the District of Columbia led to a settlement with Household Finance Corporation totaling nearly a half-billion dollars. U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 62-63 (2004).[23] If anything, allowing states to enforce their own fair lending laws will likely result in more enforcement – and, therefore, more protection for minority communities.

As the number of investigations and enforcement actions by states demonstrates, many states are highly motivated to vindicate their citizens' civil rights. Indeed, state enforcement agencies are especially sensitive to local concerns because they are in contact with their constituents more regularly. *See Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens." (citing *New York v. United States*, 505 U.S. 144, 168-69 (1992))). States have led the way in implementing fair housing legislation; when Title VIII was enacted in 1968, twenty-two states had

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[23]*See also* U.S. GEN. ACCOUNTING OFFICE, OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION LAWS TO NATIONAL BANKS 20 (2006) (describing cooperative judicial proceedings brought by states against national banks concerning telemarketing practices and the disclosure of cardholder information to third parties).

already passed fair housing legislation. Collins, *supra*, at 16, 20. Today, at least twenty-seven states have adopted laws designed expressly to curb predatory lending. *See* Peterson, *supra*, at 516 n.3 (listing state predatory lending statutes).

This is not to say, of course, that states will always be better enforcers of fair lending and fair housing laws than the federal government. After all, residential segregation was perpetuated by state and local governments as well as by federal agencies. Rather, it stands to reason that the regulatory framework designed by Congress, in which multiple enforcement regimes coexist, will likely result in more enforcement overall, and thus more protection of minority communities.

CONCLUSION

For the foregoing reasons, as well as those outlined by the petitioner, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Among its other fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory housing and lending practices. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS and Washington, D.C.

The National Fair Housing Alliance ("NFHA") is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals. It was founded in 1988 to lead the battle against housing discrimination and to ensure equal housing opportunity for all people. Through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement, the NFHA promotes equal housing, lending, and insurance opportunities.

Founded by Charles Hamilton Houston who hired Thurgood Marshall as its first Director-Counsel, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has provided legal assistance to African Americans and other people of color in securing their civil and constitutional rights for over six decades. Through litigation including such seminal cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948), LDF has maintained a longstanding commitment to eradicating discriminatory lending

and other practices that have perpetuated residential segregation and impeded access to economic opportunity. LDF has also been a zealous advocate for laws and policies at the federal and state levels guaranteeing fair lending and equal access to credit for all Americans.